

UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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AMERICAN-HAWAIIAN STEAMSHIP COMPANY, a  
Corporation, Owner and Claimant of Steamship "Vir-  
ginian,"

Appellant,

vs.

STRATHALBYN STEAMSHIP COMPANY, LTD., a Cor-  
poration,

Appellee.

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AMERICAN-HAWAIIAN STEAMSHIP COMPANY, a  
Corporation, Owner and Claimant of Steamship "Vir-  
ginian,"

Appellant,

vs.

STRATHALBYN STEAMSHIP COMPANY, LTD., a Cor-  
poration, as bailee of a cargo of lumber consisting of  
3,563,011 feet, and for the use and benefit of the owners  
and insurers of said cargo,

Appellee.

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APPELLANT'S PETITION FOR A REHEARING

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Filed 28 19



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Appellant,

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## APPELLANT'S PETITION FOR A REHEARING

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The Appellants herein respectfully petition for a rehearing of the above cause upon the following grounds:

1. That the Court has apparently overlooked appellant's contention that any error committed by the

Virginian was an error *in extremis* for which she cannot be held at fault.

2. That the Court in adopting the Lower Court's finding that the Virginian did not reverse until "less than a minute" before the collision has overlooked the fact that such finding was not only contrary to all the positive testimony on this point, but that it was based on indirect testimony, which when properly considered proved the Court's conclusion to be a physical impossibility.

3. That the Court in finding the Virginian at fault for proceeding on her course, has overlooked the uncontradicted testimony that her engines were stopped immediately after the Strathalbyn's first whistle.

4. That the Court in finding the Virginian at fault for not blowing a danger whistle has overlooked the requirements of Rule III of Art. 18 of the Inland Rules of Navigation and Rule I of the Pilot Rules for the Inland Waters of the Atlantic and Pacific Coast, which taken in conjunction with Rule IX of Art. 18 of the Inland Rules and Rule III of the Pilot Rules forbid the giving of any such whistles unless the approaching vessel is *in sight*.

5. That the Court has overlooked the fact shown by the undisputed testimony that the Strathalbyn had the Virginian in full sight at all times, knew her po-

sition and manoeuvres and that therefore the failure of the Virginian to blow a danger signal, if a fault, was not a contributing fault, especially as the Virginian had refused to answer previous passing signals.

6. That the Court has overlooked the fact that the primary causative fault of the *Strathalbyn* in not having sufficient visible lights was clearly established (and so found by this Court as well as the Lower Court) and that under the rule laid down by the Supreme Court of the United States in the *Victory*, 168 U. S., 410, the contributing fault on the part of Virginian must be clearly established and all doubts should be resolved in her favor.

#### ARGUMENT

This Court, after stating the facts as found by the Lower Court and apparently adopting the same, disposes of appellant's contentions without discussion as follows: "It seems too clear to require discussion that the Virginian was in fault in proceeding on her course and in not stopping and reversing her engines sooner than she did after hearing the signals of the *Strathalbyn*, and in not giving a danger signal."

Both the record and briefs in this case are lengthy, and appellants would not ordinarily ask this Court to reconsider the same. In the present case, however, all of the alleged faults found against the

Virginian are predicated upon a violation of one or more of the Articles of the Inland Rules of Navigation. In such a case we feel that this Court should clearly point out the proper construction of such rule or rules for the future guidance of navigators. It certainly cannot be said that the rules here involved are so clear and unambiguous as to admit of but one construction. This record abounds with testimony of expert navigators as to the proper construction and meaning of these rules, much of which testimony is in direct conflict. We feel that the proper construction of these rules is of vital importance to navigators and that we are justified in asking this Court to construe the same.

This Court finds the Virginian in fault "in proceeding on her course and in not stopping and reversing her engines sooner than she did after hearing the signals of the Strathalbyn."

If it is meant by this language to charge the Virginian with fault in failing to change or alter her course after hearing the signals of the Strathalbyn, it seems to us that the Court has not fully considered the effect of Rule I of Article 18, and Pilot Rule 4, and certain decisions which should have controlling effect upon that situation. As we construe the rule, it would have been a fault for the Virginian to have changed or altered her course when the approaching vessel was not visible.

In the case of *The Umbria*, — U. S., —, the Court said:

"We think it would have been more prudent on the part of *The Iberia* not to have changed her course until the position and course of the approaching steamer had been definitely ascertained."

In the case of *The Resolution*, 6 Asp. Rep. N. S., 363, the Court said:

"Altering the helm before the approaching vessel's position was known was condemned as acting in the dark."

In the case of *The Vindomova*, 6 Asp. Rep. N. S., 569, the House of Lords held substantially that until the position of the other vessel is definitely ascertained, a vessel is not justified in altering her course.

Rule 1 of Article 18 and Pilot Rule 4 require approaching vessels, when the passing signal is given, to change their course accordingly, but Rule 9 of Article 18 specifically provides that these whistle signals for vessels meeting, passing, or overtaking are never to be used except when steamers are in sight of each other, and the course and position of each can be determined by sight of the vessel or by sight of its signal lights. Under these decisions and these rules, it seems clear to us that the Virginian was not permitted to either alter her course or answer the signals of the Strathalbyn, as that vessel was not in sight.

This Court adopts, *in toto*, the findings of the Lower Court, and finds the Virginian at fault "in not stopping and reversing her engines sooner than she did after hearing the signals of the Strathalbyn. Neither the opinion handed down by this Court nor that handed down by the Court below attempts to accurately determine the time and distances involved in the various incidents occurring between the time the Virginian passed Pully Point and the time of the collision, and we would respectfully submit to the Court that a careful examination of the facts, as established in the record, will demonstrate that the Virginian was *in extremis* at the time she is alleged to have failed in the particulars mentioned, and also that no action taken by the Virginian under the circumstances as they actually existed, did contribute, or could possibly have contributed to the collision.

It is established without contradiction from any source that the Virginian passed Pully Point at 7:53 p. m., and that the Virginian and Flyer were abeam at that time. See testimony Captain Green, Master of the Virginian (Ap. p. 833, 847); McLeod, officer on watch on Virginian (Ap. p. 889); Duffy, pilot on Virginian (Ap. p. 1157). Burns, Master of Flyer, testifies that he passed the Virginian at Pully Point (Ap. p. 173). His time was about 7:55. Penfield, Master of the Indianapolis, passed the Virginian and Flyer at 7:54, just south of Pully Point. (Ap. p.

990). He passed Pully Point going north at about 7:55 (Ap. p. 983). We submit that this testimony establishes beyond question the fact that the Virginian and Flyer were abeam and passed Pully Point at 7:53, Virginian's time, or within a few seconds thereof.

We think it is equally well established that the collision occurred at about 7:59, Virginian's time. The entry on the engine room log of the Virginian states that she stopped reversing her engines at 7:59, which was immediately after the collision. Of course, this entry does not purport to be accurate to the second. It was made shortly after the collision and merely indicates that the time was nearer 7:59 than it was either 7:58 or 8 o'clock. McLeod, who was on watch at the time, states that the collision was just before 8 o'clock (Ap. p. 900). Shuri, the quartermaster at the wheel, gives the time as 7:59 by the Virginian's clock in the wheel house. He states that he noted and recorded the time at once; (Ap. p. 903.) Duffy, pilot, says the collision occurred between 7:59 and 8 o'clock (Ap. p. 1166). We earnestly insist, therefore, that the time of the collision is definitely fixed at approximately 7:59, and that the time between the passage at Pully Point by the Flyer and the Virginian and the collision was approximately 6 minutes.

The record also clearly establishes, and both the Court below and this Court have found that the Flyer

was making 14 to  $14\frac{1}{2}$  knots, the Virginian 11 knots, and the Strathalbyn slightly over 6 knots per hour. With these facts established, it is merely a mathematical proposition to demonstrate that the Virginian and Strathalbyn, at the time of the giving of the first signal by the Strathalbyn to the Virginian, were considerably less than half a mile apart, and that the time that elapsed between the first signal from the Strathalbyn to the Virginian and the collision did not exceed  $1\frac{1}{2}$  minutes.

One other fact as to the situation of the vessels is established by the testimony of all the witnesses, and that is that the Strathalbyn and Flyer were abeam at the time the Strathalbyn gave her first signal to the Virginian. This fact was established by the testimony of Beecher, pilot of the Strathalbyn (Ap. p. 222), and Purdy, first officer of the Strathalbyn, who says that the Flyer was on the Strathalbyn's port quarter at the time (Ap. p. 288); and Burns, master of the Flyer (Ap. p. 115); Decision Lower Court (Ap. p. 115).

The following calculation shows that the findings of the District Court as to distances and time, and which have been adopted by this Court, cannot possibly be correct:

The Virginian passed Pully Point and was passed by the Flyer at (Virginian's chart room clock)..... 7:53 P. M.

Adding thereto the several periods of time stated by the District Court as having elapsed before the collision, we find:

1st:	Time after Flyer passed Virginian off Pully Point until Flyer signalled the Strathalbyn.....	5 min.
2nd:	Time after Flyer signalled Strathalbyn until Strathalbyn signalled Virginian (Flyer and Strathalbyn having covered the distance between the two of one mile during that time)....	3 min.
3rd:	Time after Strathalbyn's signal to Virginian until collision .....	3 min.
	Total .....	11 min.

Would bring the time of collision at.....8:04 P. M. or approximately 5 minutes later than the collision actually occurred. In other words, the Court has practically doubled the time that elapsed between the time the Virginian passed Pully Point and the collision.

The Court stated that within 5 minutes or less after passing the Virginian, the Flyer was signalled by the Strathalbyn; that the Strathalbyn and Flyer were at this time one mile or less apart; and that the Strathalbyn, when on the bow or abeam of the Flyer, first signalled to the Virginian. With these factors determined, the distance between the Strathalbyn and the Virginian, at the time the Strathalbyn gave her first signal to the Virginian, is easily demonstrated.

The Flyer making.....14 knots per hour,  
The Virginian making.....11 knots per hour,

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Difference ..... 3 knots per hour.

In five minutes, or 1-12 hour, the Flyer would  
draw ahead of the Virginian 1-12 of 3  
knots, or .....  $\frac{1}{4}$  knot.  
Strathalbyn and Flyer 1 mile apart:

Flyer at ..... 14 knots per hour  
Strathalbyn at .... 6 knots per hour

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Were approach-  
ing at ..... 20 knots per hour,  
and would cover 1 mile every 3 minutes. With  
the difference in speed between the Flyer and  
Virginian, as above stated, of 3 knots per  
hour, in 3 minutes the Flyer would draw  
ahead of the Virginian..... 3-20 knot

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So that the distance between the Strathalbyn,  
which was abeam of the Flyer, and the Vir-  
ginian, when the first signal was given to the  
Virginian was 2,416 feet, or..... 8-20 knot

The Trial Court also said that the collision did  
not occur for three or four minutes after the first  
whistle of the Strathalbyn to the Virginian, during  
which time the Strathalbyn blew two passing and a  
danger signal, and we understand this Court to adopt  
these conclusions of the Lower Court. This finding  
was, of course, based upon the testimony of the  
Strathalbyn's witnesses as to these passing signals.  
That testimony is as follows:

1st whistle:	Strathalbyn signalled Virginian when abeam of Flyer.	
2nd whistle:	After waiting a minute and receiving no answer, second signal was blown, and engines stopped.	1 minute under full speed.
3rd whistle:	After waiting a minute, the Virginian not answering, and her red light being still hidden, another blast was blown.	1 minute under stopped engines.
	A minute and a half later Strathalbyn reversed her engines.	1½ min. under stopped engines.
Danger Signal:	The Virginian still coming on and giving no signal, no change in course being observable, and collision being imminent, the Strathalbyn gave the danger signal, which was immediately answered by the Virginian's three blasts and within less than a minute boats came into collision.	1 minute under reversed engine.

—  
4½ minutes.

In respect to the Virginian, the Court has found as a fault of the Virginian that her engines were not reversed until less than a minute before the collision. Applying these conditions to the respective speeds of each steamer for the period of 4 minutes, the following results are produced:

*Strathalbyn:*

1 minute under full speed.....	608 feet
$2\frac{1}{2}$ minutes under stopped engines (at full speed equal to 1,520 ft.).....	1,180 feet
1 minute under reversed engines, at one-half speed .....	304 feet

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Distance Strathalbyn would progress..2,092 feet

*Virginian:*

3 minutes under stopped engines at full speed, 1,115 feet per minutes, allowing for lost momentum .....	2,500 feet
Less than 1 minute under reversed engines, say .....	300 feet

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Minimum distance which two steamers would progress within the time and under the conditions found by the Court..4,892 feet

It seems, therefore, clearly apparent that the distance between the vessels being not exceeding 2,416 feet, as above shown, and that the vessels would, in the time found by the Court, cover 4,892 feet, the Court's finding of time elapsing between the first signal given by the Strathalbyn to the Virginian until the collision is erroneous and that the time between these occurrences could not have exceeded  $1\frac{1}{2}$  to 2 minutes.

Therefore, if these facts are established, to-wit: (1), that the Virginian and Flyer were abeam and passed Pully Point at 7:53; (2), that the collision occurred at or about 7:59; (3), that the speed of the Flyer was 14 to  $14\frac{1}{2}$  knots, the Virginian, 11 knots, the Strathalbyn, 6 knots plus; and (4) that the Strath-

albyn's first signal to the Virginian was when she was abeam of the Flyer, it seems clearly to follow that the vessels were *in extremis* from that time on and that no action could have been taken by the Virginian that would have averted this collision.

It should also be noted that there is no dispute over the fact that the Virginian stopped her engines immediately after the first signal from the Strathalbyn, and that the officers in charge of her navigation would require some appreciable time in their endeavors to locate the approaching vessel.

The conclusion deduced above, that the vessels were not to exceed  $1\frac{1}{2}$  to 2 minutes apart when the first signal was given to the Virginian by the Strathalbyn, is also corroborated by certain of the testimony of the officers in charge of the Strathalbyn. The collision occurred practically on the direct course of the Virginian, and head on, or nearly so. The officers navigating the Strathalbyn testified that when they give their signal to the Flyer, they ported their helm. They further testified that when they gave the first signal to the Virginian, they again ported their helm, and after waiting about a minute, and receiving no response, they gave the second signal and again ported their helm. If the time elapsing between the giving of the first signal and the time of the collision was as correct as that found by the Court, it is man-

ifest that the *Strathalbyn*, having ported her helm, would have progressed so far to her own starboard as to have been beyond the path of the *Virginian*. Either the statement of the officers of the *Strathalbyn*, that they ported their helm at the various times stated by them, is no correct, or the time elapsing between such action and the collision was too short to enable the vessel to make any material progress on her new course to starboard. Of course, if the *Strathalbyn*, after giving the signal that she was porting her helm, failed to do so, that was a clear error in navigation. This Court finds that there was no fault in the navigation of the *Strathalbyn* save in respect to her lights. Inasmuch as the collision was head on, or nearly so, and the *Virginian* had proceeded on her course without changing her helm, it follows that the reason the *Strathalbyn* had not progressed far enough to starboard to get beyond the path of the *Virginian* was the lack of time for her helm to take effect. The whole question of the alleged fault of the *Virginian*, in delaying the reversal of her engines, depends upon the distance between the *Strathalbyn* and the *Virginian* when the first signal was given to the *Virginian* by the *Strathalbyn*. It is not to be expected that the judgment of men as to distances on a dark night will either agree or be entirely accurate, nor will their statements of the time elapsing between two events be entirely reliable. The state-

ment of different witnesses, however, upon those points, is entitled to some consideration. Captain Burns, of the Flyer, testified that the Virginian was about  $\frac{1}{8}$  of a mile astern at the time the Strathalbyn signalled the Flyer (Ap. p. 178); McLeod testified that two minutes after the Flyer passed the Virginian, he heard one whistle ahead, which was answered by the Flyer (Ap. p. 891); Captain Duffy testified that the Flyer was 300 or 400 feet ahead of the Virginian when he heard a whistle from ahead, which was answered by the Flyer (Ap. p. 1158); Captain Green, of the Virginian, testified that he came on the bridge immediately after the first whistle of the Strathalbyn to the Virginian, and the Flyer was then about 1,000 feet ahead of the Virginian.

Allowing for the inaccuracies to be expected in testimony of this sort, under the conditions existing, we submit that this testimony is not unduly at variance, and is sufficiently corroborated to establish that the approximate time between the passing of the Virginian and the Flyer, off Pully Point, and the time at which the signal was given by the Strathalbyn to the Flyer, was not to exceed 2 minutes.

Captain Burns further testified that the Strathalbyn was  $\frac{1}{4}$  to  $\frac{1}{2}$  mile ahead of the Flyer when the Strathalbyn first signalled the Flyer (Ap. p. 174, 175). Captain Beecher, of the Strathalbyn, testified that the

Flyer was from  $\frac{1}{4}$  to  $\frac{1}{2}$  mile ahead of the Strathalbyn when he signalled the Flyer, thus confirming Burns' estimate (Ap. p. 205, 222).

The known speed of the two vessels was approximately as follows:

Flyer, 14 $\frac{1}{2}$  knots per hour, or 1,469 ft. per min.  
Virginian, 11 knots per hour, or 1,115 ft. per min.  
Strathalbyn, 6 knots per hour, or 608 ft. per min.

Taking the time when the Flyer passed the Virginian, and when the Virginian was abeam Pully Point at 7:53, and the time between the Flyer passing the Virginian and the time the Strathalbyn signalled the Flyer as about 2 minutes, and the time between the Strathalbyn signalling the Flyer and the time she signalled the Virginian as about 2 minutes, it results that the Strathalbyn signalled the Virginian at about 7:57, or about 2 minutes before the collision. Under the established facts, we think that this time cannot be over  $\frac{1}{2}$  minute out of the way, as the difference in speed between the Flyer and Virginian was 354 feet per minute, and in the 4 minutes elapsing between the passing of Pully Point and the giving of the signal by the Strathalbyn to the Virginian, the Flyer would gain  $4 \times 354$  feet, or 1,416 feet, on the Virginian. The Strathalbyn being abeam of the Flyer at the time that signal was given, she was, therefore, only 1,416 feet distant from the Virginian. If the time which elapsed between the Flyer passing the Vir-

ginian and the time when the *Strathalbyn* (being then abeam of the *Flyer*) signalled the *Virginian*, was 5 minutes, then that signal must have been given at 7:58 (7:53 plus 5 minutes), or about one minute before the collision.

It is therefore established beyond any reasonable doubt that this collision occurred from one to one and one-half minutes after the *Strathalbyn* first signalled the *Virginian*, at which time the vessels were *in extremis*.

That this must be true is shown by the calculations below, which are dependent upon the time elapsing between the *Flyer* passing the *Virginian* off Pully Point at 7:53 and the time the *Strathalbyn* blew her first signal to the *Virginian*—it being established that the collision occurred at 7:59 (between 7:58½ and 7:59½) by the *Virginian*'s time.

Time signal given.	Length time before collision.	Distance between <i>Virginian</i> and <i>Strathalbyn</i> when signal given.
If 1 min.....7:54	5 min.	354 feet
" 2 " .....7:55	4 "	708 "
" 3 " .....7:56	3 "	1,062 "
" 3½ " .....7:56½	2½ "	1,239 "
" 4 " .....7:57	2 "	1,416 "
" 4½ " .....7:57½	1½ "	1,593 "
" 5 " .....7:58	1 "	1,770 "

In other words, if *Strathalbyn* signalled the *Virginian* at 7:54, the *Flyer* was at this time abeam of *Strathalbyn* and only 354 feet (1 minute in time) past *Virginian* and therefore *Strathalbyn* would have been

only 354 feet distant from Virginian. This was five minutes prior to collision. As Virginian and Strathalbyn were approaching each other at combined speed of 1,723 feet per minute (1,115 feet per minute Virginian's speed and 608 feet per minute Strathalbyn's speed) they would have collided in a fraction of a minute despite any possible movement of their engines. This result is manifestly impossible. It is likewise impossible, from same calculations, that such signal could have been given at 7:55, 7:56 or 7:56½. This first signal of the Strathalbyn to the Virginian must therefore have been given at some time between 7:57 and 7:57½ when the vessels were from 1,400 to 1,600 feet apart. It will be remembered that up to the time this first signal was given by the Strathalbyn that these vessels were approaching each other at full speed (1,723 feet per minute, or 29 feet per second) and after allowing for all possible reduction in speed obtainable by reversing engines (the Strathalbyn does not claim to have stopped her engines until her second whistle to Virginian), the vessels would come together if:

1,062 feet distant in about  $\frac{3}{4}$  of a minute,  
1,239 feet distant in less than 1 minute,  
1,416 feet distant in about 1 minute,  
1,593 feet distant in about  $1\frac{1}{2}$  minutes.

It was therefore impossible for these vessels to have retarded their engines so as to have avoided a collision in any of the above situations.

Keeping in mind that both vessels were proceeding at full speed up to the time this first signal was given to the Virginian by the *Strathalbyn*, and that they were approaching each other at the rate of 1,723 feet per minute (Virginian 1,115 feet per minute, *Strathalbyn* 608 feet per minute), or 29 feet per second, and allowing the officers navigating the Virginian some appreciable time for searching the waters ahead in order to discover the vessel signalling, it is apparent that there was no time when the Virginian could be charged with the fault in delaying to reverse her engines, and that such a reversal at any time when she could have been expected to reverse would not have avoided the collision.

In *The Bluejacket*, 144 U. S. 371, it was held that when the danger of collision became apparent  $2\frac{1}{2}$  minutes before the collision, the vessels were to be considered *in extremis*.

In *The Delaware*, 161 U. S. 459, it was held that the whistle given when the vessels were about  $\frac{1}{8}$  of a mile apart, was given too late to put the other vessel in fault for failure to answer. Many other cases bearing upon this situation are given in the brief of appellant, at page 122 et. seq.

We have ventured to ask the Court to re-examine the facts in this case because of the importance of the case to the parties involved, and also because the

rules of navigation are necessarily involved in the decision. It is a conceded fact, so found by this Court and the Trial Court, that the *Strathalbyn*'s lights were dim and obscured from ahead, so that they could not be seen from the deck of the *Virginian*, notwithstanding diligent efforts were made by the officers of the *Virginian* to locate the vessel. This was, of course, a flagrant and glaring fault on the part of the *Strathalbyn* and is the primary cause of this collision. It is well settled that where one vessel is guilty of a glaring fault sufficient of itself to cause a collision, the other vessel will not be held for a division of the damages unless its fault is clearly established. Whether there was any fault on the part of the *Virginian* or not, under the theory of the decision of both the Trial Court and of this Court, depends upon what occurred between the time the *Strathalbyn* gave its first signal to the *Virginian* and the collision, and on the time elapsing between those two events. The Court below, whose findings have been adopted by this Court without discussion, apparently did not attempt to fix this time with any degree of accuracy, but used general terms. It was stated that the time elapsing between the *Flyer* passing the *Virginian* and the giving of the signal to the *Flyer* by the *Strathalbyn* was "about five minutes," and the time elapsing between the signal to the *Flyer* and the giving of the signal to the *Virginian* as "about three minutes," and the time elapsing be-

tween that event and the collision as "about three minutes."

We earnestly insist that the record furnishes sufficient data to fix these times with a much greater degree of accuracy than was done by the Trial Court, and that the question of fault on the part of the Virginian in delaying the reversal of her engines depends entirely upon the fixing of that time with some degree of accuracy. If, as we understand, the time elapsing between the giving of the signal to the Virginian by the Strathalbyn and the collision was not to exceed  $1\frac{1}{2}$  to 2 minutes, it would seem clear, under the authorities, that the Virginian cannot be charged with any fault with respect to a delay in reversing her engines. It is conceded that her engines were stopped immediately upon hearing the first signal, her officers diligently endeavored to locate the vessel giving that signal and they were entitled to a reasonable time in that endeavor. It seems to us to be an exceedingly harsh finding against the Virginian to charge her with contributing fault in the failure to make that search and reach the conclusion that there was imminent danger of immediate collision and requiring her to immediately reverse her engines in time to avoid a collision brought about by the flagrant fault of the other vessel, and this conclusion is emphasized by the admitted fact that the Strathalbyn at all times had full view of the Virginian and was in a position to deter-

mine whether there was danger of a collision, and gave no danger signal until the collision was absolutely unavoidable.

The officers of the Virginian knew that the Strathalbyn could see the Virginian, and knew her course and direction, and therefore were in position to determine whether there was danger of a collision, and they reasonably had a right to assume that there was no imminent danger of a collision so long as the Strathalbyn gave no danger signal.

This Court also finds the Virginian at fault "in not giving a danger signal." This question was discussed in appellant's brief, beginning on page 126. We are not able, at this time, to add any force to the argument there presented. It involves a construction of the rules of navigation. It has seemed to us that those rules prohibited a vessel giving the danger signal when the other vessel is not in sight, and this is the construction given to the rules by the navigating officers of the Virginian and by Captain Sprague and other experienced navigators who were examined as witnesses in this case. If that construction of the rules is erroneous, it is, of course, important that this error prevailing among navigators should be corrected, so that in the future navigating officers will clearly understand that the danger signal required by Rule 3 of Article 8 must be given even though the approach-

ing vessel cannot be seen, notwithstanding the provision of Rule 9 of Article 18, which provides that "the whistle signals provided in the rules under this article for steam vessels meeting, passing or overtaking, are never to be used except when steamers are in sight of each other and the course and position of each can be determined in the day time by the sight of the vessel itself, or by night by seeing its signal lights."

With respect to the *Strathalbyn*, this Court finds that "no fault can be found with her navigation or her manoeuvres." It is a conceded fact that the *Strathalbyn* did not give the danger signal until the collision was so imminent that no possible measure could avoid it. If the *Strathalbyn* was guilty of no fault in thus delaying to give the danger signal until it could have accomplished no purpose, notwithstanding the admitted fact that her officers could see the *Virginian* at all times, and knew her course and direction and proximity to the *Strathalbyn*, it seems inconsistent to charge the *Virginian* with the fault in not giving the danger signal when it is admitted that she could not see the *Strathalbyn* because of the latter's obstructed lights and had no means of determining her course or direction or exact position, nor whether a collision was imminent or not.

We most respectfully urge the Court to re-ex-

amine these questions, feeling confident that such re-examination will result in clearing the Virginian of the faults attributed to her by the decision handed down by this Court.

In closing, we call attention to the fact that the copy of the opinion of this Court, furnished us by the Clerk, recites that this case was heard before Judges Gilbert, Ross and Hunt. We think that your records will show that the case was argued before Judges Gilbert, Morrow and Hunt.

Respectfully submitted,

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